UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

C. W. MINING COMPANY, d/b/a CO-OP MINE,[1]

Employer,

Case 27-RC-8326

and

UNITED MINE WORKERS OF AMERICA,

Petitioner,

INTERNATIONAL ASSOCIATION OF UNITED WORKERS UNION,

Intervenor/Incumbent Union.[2]

DECISION AND DIRECTION OF ELECTION

On May 19, 2004, the United Mine Workers of American (herein the Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act (herein the Act) seeking to represent certain employees of C. W. Mining Company, d/b/a Co-Op Mine (herein Co-op Mine or Employer). On July 20 and 21, 2004, a hearing was held in this matter before a hearing officer of the National Labor Relations Board, and the parties filed briefs following the hearing.[3]

The parties stipulated at hearing to the appropriateness of the following unit:

[1] The name of the Employer appears as amended at hearing.
[2] The International Association of United Workers Union, herein called the Intervenor Union, was permitted to intervene at the hearing in accordance with Section 102.65 of the National Labor Relations Board Rules and Regulations.
[3] Petitioner delivered its brief after close of business on the due date. The following day, Petitioner hand-delivered a motion to file its brief out of time, explaining that its brief had been given to a delivery service with expectation that timely delivery would be made. Timely delivery to the Regional Office was apparently not made solely due to unanticipated traffic delays. No party has objected to Petitioner's request, and I find the late filing was for excusable neglect that resulted in no prejudice to any party. Accordingly, I grant the motion and receive Petitioner's brief.

> INCLUDED: All full-time, regular part-time, and seasonal production and maintenance employees and plant clericals employed by the Employer at its coal mine and property in the Huntington, Utah, vicinity.
>
> EXCLUDED: All professional, managerial, office clerical, and confidential employees and guards and supervisors as defined in the Act.

The Employer, C. W. Mining Company, is a Utah corporation operating the Co-op Mine, an underground coal mine located near Huntington, Utah. The Employer's records list approximately 220 non-supervisory unit employees, including 97 full-time and 123 part-time employees. This total includes 15 part-time and full-time seasonal employees. The International Association of United Workers Union (the Intervenor Union) was certified as the Co-op Mine production and maintenance employees' representative on January 17, 1980.[4] The Employer and the Intervenor Union have negotiated a series of collective-bargaining agreements, the most recent of which is effective by its terms from August 8, 2001, to August 10, 2004. The United Mine Workers of America, by its petition filed May 19, 2004, seeks to replace the Intervenor as the bargaining representative of the unit employees.

This case presents the following issues: (1) Whether certain employees should be excluded from the bargaining unit either because they are members of the Davis County Cooperative Society, Inc. (herein the Davis Co-op),[5] or because they are related to shareholders, officers, and/or supervisors, or because they work an irregular schedule; (2) whether the International Association of United Workers Union is a labor

[4] Case 27-RC-5947

[5] According to Petitioner witnesses, the term "Kingston Order" is often used to refer to the organization of people who are associated with the Davis County Cooperative Society, Inc., many of whom are Kingston family members, or descendants of other Davis Co-op founders and early board members. At hearing, counsel and witnesses for the Employer and Intervenor preferred to use the term "Davis County Cooperative Society" at hearing, noting that there was no legal entity known as the "Kingston Order."

organization within the meaning of Section 2(5) of the Act; and (3) whether Jose Ortega, Sr., should be excluded from the bargaining unit as a statutory supervisor.

The Petitioner contends that three overlapping categories of employees should be excluded from the bargaining unit because they do not share a sufficient community of interest with other employees: 1) employees who are members of the Davis Co-op; 2) employee-relatives of shareholders, managers, and/or supervisors; and 3) employees who work an irregular schedule.[6] Relying primarily on *Seton Hill College*, 201 NLRB 1026 (1973), Petitioner argues that all employees who are members of the Davis Co-op should be excluded from the bargaining unit because they owe a strong allegiance to that organization and its leaders exercise control over members, as well as the Employer. In addition, the Petitioner asserts that Davis Co-op members lack the same economic interests as other employees and that they participate in an alternative economic system.

The Petitioner also contends that employees who are related to the Employer's shareholders, managers, and/or supervisors should be excluded from the bargaining unit because they do not share a community of interest with other employees and because they receive special job-related benefits. Although conceding that no individual shareholder has sufficient ownership interest to exclude their spouse or children under the Act's Section 2(3) definition of "employee," the Petitioner argues that the employee-relatives here nevertheless have sufficient familial ties to warrant their

[6] It appears that the Petitioner is not truly arguing that employees who work an irregular work schedule are ineligible to vote merely due to their irregular work schedules. In fact, the parties stipulated that the principles established in *Davison-Paxson Co.*, 185 NLRB 21, 24 (1970), should govern voter eligibility of part-time employees. To the extent the Petitioner is arguing that certain employees who work an irregular schedule enjoy special privileges due to their membership in the Davis Co-op or by virtue of family membership, that issue is addressed in the consideration of those factors.

exclusion based upon factors found acceptable on review in *N.L.R.B. v. Action Automotive, Inc.*, 469 U.S. 490 (1985), and in *Linn Gear Co. v. N.L.R.B.*, 608 F.2d 791 (7th Cir. 1979). And, with regard to employee-relatives of non-owner managers, the Petitioner contends that they receive special job-related benefits because of their familial ties, including the privilege of working part-time and exceptional flexibility in their schedules. The Petitioner also contends that the Intervenor Union cannot be a labor organization within the meaning of Section 2(5) of the Act because its officers and members are linked to the Employer as relatives of its owners and managers. Finally, the Petitioner would exclude Jose Ortega, Sr. as a statutory supervisor because he allegedly fired an employee and because his wage rate is considerably higher than that of other employees.

The Employer would include all employees covered by the unit description and maintains that reliance on *Seton Hill College* is misplaced because Davis Co-op is not a religious order and it does not own the land or facilities of the Employer. In addition, the Employer contends that only one of its stockholders is an officer, director, or shareholder of Davis Co-op and points to the lack of evidence that its employees have taken any vow of poverty or obedience to Davis Co-op. The Employer further asserts that each employee receives his or her full wage and is not provided with housing or other economic benefits from Davis Co-op.

The Employer concedes in its post-hearing brief that many of its employees are related to owners or managers, but maintains such relationships are not uncommon in a small town and limited geographical area. Citing *Pierce-Phelps, Inc.*¸ 341 NLRB 78

(2004), as well as several other Board cases,[7] the Employer argues that under current Board law relatives are excluded from bargaining units only when special job-related benefits can be shown. According to the Employer, the employee-relatives at issue here receive no special privileges or benefits as a result of their relationship to owners or managers. Regarding the supervisory status of employee Joe Ortega, the Employer contends he should be included in the unit because there is no evidence that he has supervisory authority. Finally, the Employer takes the position that the Intervenor/Incumbent Union is a labor organization within the meaning of the Act.

The Intervenor Union argues that the unrebutted evidence of its activities as the certified collective-bargaining representative of the Co-op Mine employees establishes its status as a labor organization under the Act. In response to the Petitioner's position, the Intervenor Union contends that none of the international or local officers are related to any of the Employer's shareholders, officers, directors, or supervisors, and the record fails to establish that any employees are Davis Co-op members. In regard to the remaining issues, the Intervenor Union joins in the Employer's Post Hearing Brief.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director. Based upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.[8]

[7] *Allen Services Co.*, 314 NLRB 176 (1994); *Blue Star Ready Mix*, 305 NLRB 43 (1991); *Burlington Food Store, Inc.*, 272 NLRB 336 (1984).

[8] Prior to the opening of the hearing, I referred Employer's Petition to Revoke Subpoena Duces Tecum to the hearing officer for disposition. The hearing officer, noting on the record that the Employer was cooperating in making the subpoenaed documents available to Petitioner, reserved ruling on the motion to revoke. As no party raised any issues regarding the subpoena, further consideration of the matter was unnecessary.

2. The Employer, C. W. Mining Company, d/b/a Co-op Mine, is a Utah corporation engaged in underground coal mining at its facility located near Huntington, Utah. The Employer annually purchases and receives at its Utah facility goods, materials, and supplies valued in excess of $50,000 directly from suppliers located outside the State of Utah. Based on these stipulated facts, I find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act and it will effectuate the policies of the Act to assert jurisdiction in this matter.

3. The Petitioner, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. The Intervenor/Incumbent, International Association of United Workers Union, is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

5. For the reasons discussed below, a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

6. The following employees of the Employer constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

   Included: All full-time and regular part-time and seasonal production and maintenance employees, including plant clericals, employed by the Employer at its coal mine facility located near Huntington, Utah.

   Excluded: All office clerical employees, confidential employees, professional employees, managerial employees, guards, supervisors as defined in the Act, and all employees who are Davis County Cooperative Society, Inc. members and/or family members as described in this Decision and Direction of Election.

BASIS FOR DECISION

I. FACTS

A. Davis County Cooperative Society

Record evidence reveals that the Davis Co-op was formally established as a non-profit corporation in 1941, with Charles Elden Kingston as its first “trustee-in-trust.”

In addition to Charles E. Kingston, other individuals associated with the Davis Co-op as incorporators or members of its first governing board (herein "the founders") include M. W. Brown, Ray M. Brown, Benjamin Clegg, Ernie Ekstrom, Allen M. Frandsen, Alfred Grundvig, Francis Hansen, Charles W. Kingston, Lenard Mortensen, Ivan A. Nielsen, Charles H. Owen, Stanley W. Pratt, and Arnold L. Stoddard.[9] Following the death of Charles E. Kingston in 1948, leadership of the Davis Co-op passed to his brother, John Ortell Kingston, and when he died in 1987, his son, Paul E. Kingston, became the leader. The record establishes that other early governing board members serving about 20 years after incorporation include Clyde R. Gustafson, John O. Kingston, and Merlin B. Kingston.

Presently, Bill Stoddard[10] is one of seven members of the Davis Co-op governing board, and he testified that Paul E. Kingston is the "head" of Davis Co-op, with the title of "trustee in trust." Other Davis Co-op board members identified in the record are Wendell Owen, Ray Brown, Merlin Kingston, and Elden Kingston. Wendell Owen testified that two board member positions were unfilled at the time of the hearing.

Record evidence regarding the Davis Co-op activities and functions comes primarily from the testimony of governing board members Bill Stoddard and Wendell Owen and from the testimony of Lu Ann Cooper.[11] As to Ms. Cooper, record testimony indicates that she lived with her mother (Mary Gustafson) and aunt in her grandfather's house located in Bountiful, Utah. She associated closely with the Davis Co-op and its

[9] Ardous Kingston also signed and notarized the incorporation documents.
[10] Bill Stoddard stated his full name for the record as "Bill Weaver Stoddard." His name is shown on record documents, including the most recent collective-bargaining agreement, as "B. W. Stoddard." The 1979 Decision and Direction of Election (Bd. Exh. 3) refers to "William Stoddard" as one of the Employers' four equal partners at that time.
[11] The witness stated her full name as Lu Ann Ardous Kingston Cooper and identified her parents as John Ortell Kingston and Mary Gustafson.

family members until she left the group in 2000, when she was about 20 years old. Ms. Cooper testified that her father, John Ortell Kingston, did not live with her mother, but she had contact with him when he visited their home. In 1992, at the age of 12, Ms. Cooper's mother had her start working at the Davis Co-op office. She worked there for about three years helping to prepare monthly statements for Davis Co-op members and businesses. She also worked for other Davis Co-op businesses that are not identified in the record. In 1995, at the age of 15, she was married to Jeremy Ortell Kingston, and, as she put it, "finished growing up in Salt Lake [City]."

Ms. Cooper testified that when she worked at the Davis Co-op, she did not receive a paycheck, but was only given a "service statement" showing how much she had earned.[12] When she was old enough to file a tax return, she received a check stub, but did not actually receive a check or its equivalent in cash. She further stated, based upon her experience preparing Davis Co-op statements until 1999, that Davis Co-op members who worked at the Co-op Mine also were given check stubs without receiving the actual check. Mine manager Charles Reynolds, however, testified that workers at the mine are paid by a check and that, as far as he knew, that payment method also applied to Davis Co-op members.

Lu Ann Cooper testified concerning a debit or charge card system used by the Davis Co-op. Members with unlimited spending power receive a blue card, those whose spending level is limited by Davis Co-op, receive a green card, and those who are "on the edge of getting a green card" are issued a yellow card. According to Ms. Cooper, members can make purchases only in Davis Co-op related businesses unless they receive authorization from the Davis Co-op to do otherwise. Ms. Cooper's

[12] Ms. Cooper described a "service statement" as "the Order's own record of how they pay each other."

description of the Davis Co-op charge card system was confirmed by the Employer witness Wendell Owen, although he stated that the Davis Co-op does not tell its members where they should shop. Mr. Owen's testimony, however, does not necessarily mean that members who want to shop outside the Davis Co-op businesses would not have to obtain cash or a check from the Davis Co-op to do so. Nor does it mean that members who wish to use their Davis Co-op debit or charge card to make purchases, could do so at businesses not related to the Davis Co-op. In fact, Mr. Owen testified that his Davis Co-op card could not be used at J.C. Penny, for example.

Ms. Cooper further testified that Davis Co-op members were expected to attend training classes every other Friday to receive instructions on how to be good members and good workers in the Davis Co-op businesses. The teachers varied from meeting to meeting and included Paul E. Kingston's brothers, as well as Wendell Owen and Bill Stoddard. According to Ms. Cooper, the basic message of the various training topics was that by working for Davis Co-op businesses, they were building the kingdom of God. The specific messages she recalled from the training meetings include being told that overtime pay for members was not necessary because they were working for the kingdom of God and being told that they should be cordial to co-workers who were non-members, but not to fraternize with them outside business hours. Wendell Owen, long-term governing board member, confirmed that Davis Co-op does conduct training meetings to help members understand "what some of our values are."

Ms. Cooper also stated that she did not apply for any of the jobs she had while a Davis Co-op member. Rather, she was simply told by her then current manager[13] that

[13] Although the record does not identify any of Ms. Cooper's managers, these individuals were apparently Davis Co-op members since Ms. Cooper testified that "only family members ran these [Davis Co-op related] businesses."

she was to start working for someone else at another business. According to Ms. Cooper, this was also the way that other Davis Co-op members received their job assignments, including those members working at the Co-op Mine. Wendell Owen's testimony that the Davis Co-op does not tell members "where they must work or where they should work," does not necessarily contradict Ms. Cooper's testimony. Although job assignments may not be issued by Davis Co-op as a legal entity, that would not preclude individuals who are Davis Co-op members from telling other members over whom they have authority, that they are expected to work at the Co-op Mine or another Davis Co-op related business.

In addition, Ms. Cooper testified that during the entire time she was a Davis Co-op member, Co-op Mine supervisor Alan Jenkins announced at almost every Sunday meeting of the Latter Day Church of Christ that a weekend crew was needed to work at the mine and that anyone available should see him. The Latter Day Church of Christ was established by family members and is attended by Davis Co-op members. Even though Wendell Owen testified that the "Davis Cooperative Society, Inc." does not "recruit people to work" at the Co-op Mine, I am not persuaded that his statement refutes Ms. Cooper's testimony. Although a Davis Co-op member, Mr. Jenkins is not an officer or director of that organization, and there is no indication that he sought workers on behalf of, or as an agent of, the Davis Co-op. Thus, Ms. Cooper did not testify that the Davis Co-op recruited people to work at the mine. Rather, I view her testimony to mean that Mr. Jenkins was asking for workers on behalf of the Co-op Mine. Nor is the apparent voluntary nature of this weekend work necessarily inconsistent with Ms.

Cooper's testimony that Davis Co-op members have their regular, weekday jobs assigned to them.

Although the record does not clearly establish how membership in the Davis Co-op is achieved, there is apparently no dispute that descendants of members are themselves considered members, at least until they take some action to disassociate.[14] When witness Wendell Owen, a longstanding Davis Co-op member and director, was asked if Ren and Lyman Owen were members of the Davis Co-op, his initial answer was, "They're my children." When pressed for a direct answer, Mr. Owen testified as follows:

> A. Depends on what you call a member. We all work with it. I mean --
> Q. How did you become a member of Davis Cooperative?
> A. How did I become a member?
> Q. Yeah.
> A. I never did fill out a membership application or -- I just started associating and --
> Q. And became a member?
> A. I assume. I've never had a membership paper or anything like that that says I'm a member.

When Petitioner's counsel began his direct examination of Lu Ann Cooper, the Intervenor and Employer offered the stipulation, in lieu of foundation questions, that "she grew up as a member of the Davis County Cooperative Society." Ms. Cooper was "one of the kids" who worked preparing statements for individuals and businesses connected with Davis Co-op, including the Co-op Mine. Ms. Cooper confirmed that the Co-op Mine employees identified by her testimony as family members, as well as those in Petitioner's Exhibits 3(a)-(xxx), were all also Davis Co-op members. She further

[14] For convenience, these descendants of both past and present Davis Co-op members, together with their spouses, are referred to herein as "family members."

testified that Davis Co-op is "a group of family members . . . at least 95 percent of them are," and that the leader of Davis Co-op, Paul E. Kingston, assigns a number to certain members if they have demonstrated sufficient loyalty, and the person with the lowest number is next in line to be the leader. Nevin Pratt,[15] the Intervenor's vice president, confirmed the existence of the numbering system when he testified regarding his own membership number. Based upon the evidence summarized above, and the record as a whole, I conclude that employees of the Co-op Mine who are related to past or present Davis Co-op members by blood or marriage are themselves considered Davis Co-op members.

Lu Ann Cooper also testified that, while working for the Davis Co-op,[16] she helped prepare statements for over 100 different businesses connected with the Davis Co-op. She stated that only family members were allowed to manage these businesses and that Davis Co-op members were expected to shop at the Davis Co-op stores. Ron Barton, an investigator for the Utah Attorney General's Office, testified that he had identified approximately 173 businesses with officers, directors, or managers that his investigation indicated were Davis Co-op members. Although some Davis Co-op members may be officers, directors, managers, or owners of numerous businesses, there is no record evidence that the Davis Co-op itself owns any business other than one referred to on the record as "the Eastside Market." Specifically, the record contains no evidence that the Davis Co-op, as a corporate entity, has any ownership interest in

[15] Mr.Pratt stated his full name as Nevin Ortell Mattingly Pratt and testified that he had his named changed legally in 1987 to add the surname "Pratt," though he did not explain why he chose that name. I note that one of the original Davis Co-op incorporators was Stanley W. Pratt.

[16] Although most of her work for Davis Co-op was from 1992 to 1994, she did perform the same work again for short periods in 1998 and 1999, and during the interim, received her own personal statements from Davis Co-op. No party contends and the record contains no evidence that Davis Co-op practices have changed since Ms. Cooper left the Davis Co-op in 2000.

the Employer, even though the Employer officially does business as "the Co-op Mine." Nevertheless, as set forth below, the Employer is owned, controlled, and managed by related individuals who are members of the Davis Co-op.

Although the record provides few details about the religious beliefs of Davis Co-op members, it is nevertheless apparent that they are an organization of people whose religious-based practices in some way set them apart from society. The articles of incorporation of Davis Co-op indicate that it was founded to achieve the religious objective of the "ideal condition known as the Golden Rule" by a course of action eliminating selfishness through service to others and by promoting "the economic welfare of the membership . . . utilizing their united funds and efforts for the purchase, distribution, and production of commodities and the performance of service in their interest in the most economical way." Davis Co-op members also belong to the Latter Day Church of Christ, which the record reflects has its roots in the Mormon religion. In addition, the Davis Co-op members are taught the values of the group at regular training meetings.

B. C. W. Mining Company

The record reveals that the Employer's mining operations are located near Huntington, Utah, approximately 140 miles southeast of Salt Lake City,[17] on mine property leased from C.O.P. Coal Development Company (herein C.O.P. Coal). Ron Barton testified that all of the C.O.P. Coal officers have ties to the Davis Co-op founders. The Utah Department of Commerce online business entity record for C.O.P. Coal, of which I take administrative notice, shows that all the officers and directors of

[17] I take administrative notice of this fact based upon an examination of commonly available map resources.

that company are Kingstons.[18] The owners of C.O.P. Coal are not identified in the online business record or the hearing record.

According to Co-op Mine manager Charles Reynolds, the mine operates 24 hours a day, 7 days a week, in 12-hour shifts. Most full-time production employees are scheduled to work Monday through Thursday, every week. Part-time employees also are scheduled to work 12-hour shifts, either Friday and Saturday, or Friday, Saturday, and Sunday, for a weekend total of either 24 or 36 hours. However, part-time employees are typically only scheduled to work every third weekend. Mr. Reynolds explained that the mine uses part-time workers on the weekend shifts to minimize the amount of overtime.

In 1980, at the time the Intervenor Union was certified as the collective-bargaining agent, four equal partners, including Bill Stoddard, Wendell Owen, and Gerald Hansen, owned the Employer. The record does not reveal the name of the fourth partner. In the early 1980s, the Employer became a Utah corporation. The corporate officers, who also are the corporation's only directors, are Bill Stoddard, president, Charles Reynolds, vice-president, and Dorothy J. Sanders, secretary/treasurer.

Documents received into evidence show there are 16 Co-op Mine shareholders, with their individual ownership interests ranging from 0.5 to 14 percent, as follows: Ruth B. Finley, 1 percent; Anna O. Gardner, 10 percent; John A. Gustafson, 14 percent; Mary E. Gustafson, 9 percent; Bethany F. Jones, 2 percent; Becca M. Keddington, 9 percent; Paul E. Kingston, 9 percent; Mary O. Kohles, 2 percent; April L. McKay, ½ percent; M.

[18] The officers and directors listed are J.O. Kingston, J.D. Kingston, Luanna Kingston, and Carl E. Kingston is registered agent. It is not known whether these individuals currently occupy those positions.

A. Nichols, 1 percent; Martha E. Nichols, 9 percent; Dorothy J. Sanders, 9½ percent; Bill Stoddard, ½ percent; Julie D. Thomas, 1½ percent; Deborah E. Williams, 9 percent; and Rachel O. Young, 13 percent.

Mr. Stoddard, the Employer's president, testified that there is an annual shareholder meeting at which he reports to shareholders about how the company is running. He stated an individual can purchase stock only with approval of the existing shareholders. He was not sure whether the current shareholders have owned their shares for a long period of time and was unable to provide the given names of 9 of the shareholders.[19] Mr. Stoddard further testified that shareholders do not receive dividends and all profits "go back into the company for growth . . . into a fund." According to Mr. Stoddard, shareholders can sell their stock with approval of the board of directors, but he did not know the value of the stock.

The record evidence establishes that most of the Co-op Mine shareholders are family members. Mr. Stoddard's wife is Louise (Kingston) Stoddard, [20] and Mr. Stoddard's father, Arnold L. Stoddard, was a Davis Co-op founder and an early Davis Co-op board member. Shareholder Dorothy J. Sanders is Mr. Stoddard's daughter, and another daughter, employee Leanne Stone, married an unspecified son of Charles W. Kingston.[21] Thus, I find he is related by marriage to shareholder Paul E. Kingston, as well as other family-member shareholders. The record also establishes that shareholder Martha E. Nichols is Paul E. Kingston's daughter and shareholder Rachel

[19] The nine with given names he did not know are: Finley, Gardner, Jones, Kettingham, Nichols, McKinley, Thomas, Kohles, and McKay. Given names were provided by the Employer's counsel, with assistance from others present at the hearing.

[20] Mr. Stoddard testified that his wife is "Louise Stoddard" and that shareholder Dorothy J. Sanders is his daughter. Petitioner's Exhibit 3(iii) shows Dorothy Jill (Stoddard) Sanders to be the daughter of Esther Louise (Kingston) Stoddard, establishing that "Kingston" is the maiden name of Mr. Stoddard's wife.

[21] Lu Ann Cooper testified that employees Amber and Mary Ann Stone are daughters of Leanne Stone and granddaughters of Charles W. Kingston and Bill Stoddard.

O. Young is his sister. Further, the record contains uncontroverted testimony that Paul E. Kingston is the father of shareholder Deborah E. Williams' son (John Paul Williams) and also shareholder Dorothy J. Sanders' son (Jason William Sanders), providing another familial link to Mr. Stoddard.

Collectively, the Co-op Mine ownership interest of shareholders Bill W. Stoddard and Paul E. Kingston, and that of their close relatives described above and in the paragraph immediately below, totals 50.5 percent. The evidence establishes that a further 24.5 per cent of combined ownership interest belongs to Davis Co-op member John Gustafson, his spouse, shareholder Ruth Finley, and his daughter, shareholder Anna Gardner. John Gustafson is a family member whose parents were Clyde Gustafson, an early Davis Co-op board member, and Orlean H. Kingston, the sister of Charles E. Kingston and John O. Kingston (the first and second "trustees in trust" of Davis Co-op) and the aunt of Paul E. Kingston. Thus, shareholder John A. Gustafson is a cousin to Paul E. Kingston, and Rachel O. Young, further linking their shareholder relatives with one another.

An additional 9.5 percent of the Co-op Mine stock is owned by two shareholders who also have family ties. The parties stipulated that 0.5 percent shareholder April L. McKay is the sister of employee Todd Ellery Kingston, and, therefore, the uncontroverted evidence establishes that her father is Ellery Merlin Kingston,[22] and her grandparents are Clyde R. Gustafson and Raymond M. Brown. Thus, Ms. McKay is related to shareholders Paul E. Kingston, John A. Gustafson, and Rachel O. Young. The surname of 9 percent shareholder Mary E. Gustafson indicates she is likely a family

[22] According to Utah Department of Commerce online business entity records, of which I take administrative notice, Ellery Kingston is a principal of the Latter Day Church of Christ, discussed above.

member, especially in the absence of any contrary evidence. The record does not specify whether she is the Mary Gustafson named by Lu Ann Cooper as her mother. The remaining Co-op Mine shareholders, who collectively own 15.5 percent of the stock, include Bethany F. Jones, Becca M. Keddington, Mary O. Kohles, M. A. McKinley, and Julie D. Thomas. The record contains no genealogical information regarding these individuals. Given the familial relationships stipulated to by the Employer, or otherwise set forth in the record, and the absence of evidence to the contrary, some or all of these shareholders are likely to be closely related to Bill W. Stoddard, John A. Gustafson, or Paul E. Kingston.

In addition to family connections of the Co-op Mine shareholders, officers, and directors, the record reveals similar connections for Co-op Mine managers and supervisors. Until his January 2004 retirement as manager of the Co-op Mine, Wendell Owen was vice-president and a director of the Co-op Mine. His mother was Betsy Tucker Kingston, an aunt to Charles E. and John O. Kingston, and great-aunt to Paul E. Kingston. According to the unrebutted testimony of Lu Ann Cooper, Wendell Owen is also shareholder John Gustafson's father-in-law.[23] Mr. Owen testified that he has been a member of Davis Co-op since 1937,[24] and one of its directors for the past 30 years. His father, Charles H. Owen, was a Davis Co-op incorporator and charter member. Davis Co-op member Charles Reynolds, the son of Wendell Owen, was selected by directors Bill Stoddard and Dorothy Sanders to replace Mr. Owen as Co-op Mine vice-president and director, and also as the Co-op Mine manager. Thus, mine manager

[23] Ms Cooper testified that John Gustafson is the father of Wendell Owen's grandson, William Grow.
[24] Although the record is silent regarding the Davis Co-op prior to its 1941 incorporation, apparently it existed as an informal organization since Mr. Owen joined in 1937.

Charles Reynolds is a cousin of shareholders Paul E. Kingston, Rachel O. (Kingston) Young, and John A. Gustafson.

Family connections for most of the 14 mine supervisors[25] can also be found in the record evidence. Charles Reynolds testified that supervisors Jared and Elden Stephens are his brothers. The parties stipulated that supervisor Ethan Tucker is the brother of employee Jonathan Tucker, and, therefore, both are sons of Kathleen Kingston, grandsons of Charles W. Kingston, and cousins of mine manager Charles Reynolds, as well as shareholders Paul E. Kingston, Rachel O. (Kingston) Young, and John A. Gustafson. The 1979 Decision and Direction of Election (Bd. Exh. 3) identifies supervisor Jim Stoddard as Bill Stoddard's son. The record establishes that supervisor Chris Peterson and employee Abram Peterson are brothers, and, therefore, grandsons of Bill Stoddard's brother, Dean Stoddard. Supervisor Alan Jenkins is married to Janiel F. Kingston, daughter of Charles E. Kingston and sister of Carl E. Kingston, the Employer's attorney in this matter. The record further shows that supervisor Robert Brown is married to Kathyrn Hansen, granddaughter of Davis Co-op founder Francis Hansen, and daughter of Gerald Hansen, previously one of the four equal partners of the Employer. Supervisor Ken Defa is married to Fama Nielsen, daughter of Davis Co-op founder Ivan A. Nielsen, and supervisor Cyril Jackson is married to Angi Stoddard. The record provides no information regarding the family connections of supervisors Freddy Stoddard, Shain Stoddard, Randy Defa, Rodney Anderson, although their surnames indicate they are likely related to the family, especially in the absence of

[25] The parties stipulated that the following individuals are statutory supervisors: Rodney Anderson, Robert Brown, Ken Defa, Randy Defa, Cyril Jackson, Alan Jenkins, Chris Petersen, Kevin Petersen, Elden Stephens, Jared Stephens, Freddy Stoddard, Jim Stoddard, Shain Stoddard, and Ethan Tucker. The parties also stipulated that personnel secretary Shiree Reynolds is a confidential employee. Based on these stipulations and the record evidence, I find that these employees should be excluded from the unit.

evidence to the contrary. The same can be said for supervisor Kevin Peterson whose mother and grandmother have Mortensen surnames, suggesting familial ties with Davis Co-op founder Lenard Mortensen.

Based upon the evidence summarized above concerning family connections of Co-op Mine shareholders, officers, directors, managers, and supervisors, I find that family members associated with the Davis Co-op have the means to control management decisions of the Employer.

C. Family Connections of Employees

The record does not include a Davis Co-op membership list. Since, as discussed above, descendants of Davis Co-op members are themselves considered members, the number of employees associated with the Davis Co-op is the same as those who are family members. The record evidence regarding the extent of familial ties among Co-op Mine employees is mainly in the form of genealogical charts, prepared by investigator Ron Barton and stipulated to by the parties, and testimony from Lu Ann Cooper.

Ron Barton, an investigator for the Utah Attorney General's Office, testified that his assignment from October 2000 through June 2004 was to investigate possible crimes occurring in "closed societies," including the Davis Co-op. As part of that investigation, he obtained public records of births, deaths, and marriages of individuals believed to be associated with the Davis Co-op, and interviewed individuals who were members or former members. Using the information obtained from these sources, Mr. Barton compiled a database from which he produced genealogical charts for many individuals who are Co-op Mine employees. The parties stipulated to the accuracy of

61 of these charts, with certain exceptions,[26] and they were received into evidence. The Employer and Intervenor refused to stipulate to the charts for 13 additional employees, apparently because of disagreement regarding paternity of the subject employee. These disagreements, however, do not necessarily indicate a dispute that the employee is a family member, either through the maternal line[27] or a different paternal line.

Family ties of at least 65 additional employees were established through witness testimony, primarily that of Lu Ann Cooper, including the 13 employees mentioned above for whom a stipulation was not received. The Employer and the Intervenor challenge the family history testimony of Ms. Cooper on the grounds of hearsay and lack of personal knowledge. I find this testimony is admissible under Rule 803(19) of the Federal Rules of Evidence, which provides a relevant exception to the hearsay rule, as follows:

> Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

Ms. Cooper is closely related to most of the employees about whom she testified, and she associated or lived in the same community with all the employees whom she identified as family members. I find her testimony to be reliable for purposes of this proceeding.[28]

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[26] The Employer and Intervenor declined to stipulate to the accuracy of the fifth generation of ancestors on all of the charts, and to the accuracy of the fourth generation for at least one employee. Those excluded generations do not impact the usefulness of the charts in this case.

[27] The Employer and Intervenor stipulated to the accuracy of the maternal line for 7 of the 13 charts.

[28] The objective here is only to determine to what extent employees may be allied with a group of associated individuals. The precise lineage of individual employees is not essential for establishing their membership in the group

Based upon the Employer's records entered into evidence, there were approximately 220 employees falling under the general bargaining unit description at the time of the hearing. The record evidence establishes family ties for approximately 156, or 71 percent, of the total number of employees. Although evidence of family connections for 30 of these 156 employee-relatives is limited to their common family surnames, under the circumstances present in this case and in the absence of any evidence or claim that they are not family members, I find their shared surnames to be sufficient to infer a family connection. In any case, the record establishes that 56 percent of all employees are family members even without relying upon an inference drawn from shared surnames.

The Employer's organizational chart identifies 115 of the 156 family members, or approximately 74 percent, as part-time employees. Only 8 of the 64 employees whose family status is unknown, or approximately 12 and 1/2 percent, work part-time. The record contains no evidence as to whether those 8 part-time employees may be family members as well. Viewed from another standpoint, the record establishes that 123 of the 220 total number of employees, or approximately 56 percent, are part-time employees. Of the 123 employees who work part-time, at least 115, or about 93 percent are family members. In addition, 106 of the 123 part-time employees work weekend shifts.

Despite gaps in the available evidence, the record also establishes family relationships among the Employer's shareholders, officers, directors, managers, and employees too extensive to recite here in full. By way of example, careful examination

of the record reveals that at least 76 Co-op Mine employees are descendants of Charles W. Kingston, the father of past Davis Co-op leaders Charles E. and John O. Kingston, and the grandfather of Paul E. Kingston, the current leader. Not only are all 76 of these employees related to one another, they are also all relatives of shareholders Paul E. Kingston, Rachel O. (Kingston) Young, and John A. Gustafson. Moreover, at least 18 of these 76 employees are children of shareholders.

To further illustrate the extent of the family ties, the record reveals approximately 60 familial relationships between employees and some of the Co-op Mine managers and supervisors. Former mine manager Wendell Owen has at least 9 children and 7 grandchildren employed at the mine. These employees, of course, are also related to his son Charles Reynolds, the current mine manager, as his siblings and nephews. Supervisor Alan Jenkins has at least 9 children and 2 grandchildren among the mine employees. Since record evidence shows that Mr. Owen, Mr. Reynolds, and Mr. Jenkins are all related to the Kingston family by blood or marriage, they and their descendants are also related to the 76 employee-descendants of Charles W. Kingston discussed above. In addition to his siblings and nephews mentioned above, mine manager Charles Reynolds has 89 cousins and 3 in-laws among the non-supervisory employees, as well as two siblings who are supervisors.

D. <u>Jose Ortega</u>

Records entered into evidence establish that Jose Ortega is a full-time, weekday shift employee classified as a "belt crew leader and outby pre-shift examiner", with an hourly wage rate of $17.25. Mine manager Charles Reynolds testified that Mr. Ortega's duties include transporting his crew into the mine, fixing any problems with the belt

drive, and serving as pre-shift examiner on a rotating basis. Mr. Reynolds further testified that Jose Ortega does not have authority to fire, discipline, grant time off, authorize overtime, or assign work. Petitioner's Exhibit 5, entitled "Application to hire a new employee," is a one-page form dated January 17, 2001, and signed by foreman Randy Defa, recommending that applicant Celso Panduro be hired as a supply tractor operator. The form contains the following relevant comment written by Mr. Defa:

> He worked here before on supplies and belts. Jose O. told him he was fired for some reason I can't remember. But I think it was because Jose didn't like him for some personal reasons. I think he would do good on supplies again.

Although Randy Defa was not called as a witness at the hearing, Mr. Reynolds testified that Employer records showed that Celso Panduro was not actually fired, but simply did not return from a leave of absence, which began in October 1998. He further testified that at the time Mr. Panduro was originally employed in 1998, both Jose Ortega, Jr. and Jose Ortega, Sr. were employed, but at the time of hearing only Jose Ortega, Sr. remained an employee. According to Mr. Reynolds, neither of these employees have had supervisory authority at any time

E. International Association of United Workers Union

As noted above, the Intervenor was certified in 1980 as the Co-op Mine production and maintenance employees' collective-bargaining representative, and has negotiated a series of collective-bargaining agreements with the Employer. The contract current at the time of the hearing contains provisions covering terms and conditions of employment, including wages, hours, benefits, seniority, vacations, and job classifications. The contract also includes a provision for a multi-step grievance procedure. The Intervenor Union also has a constitution and bylaws and has filed

appropriate papers with the State of Utah to become a non-profit, tax-exempt organization.

Record evidence discussed above shows that approximately 91 current employees are members of the Intervenor Union, at least 85 of whom are family members. According to records in evidence, members pay an initiation fee and periodic dues based upon hours worked. The Intervenor Union's International officers are Ronald Elden Mattingly, president; Nevin Ortell Mattingly Pratt, vice-president; and Vicki L. Mattingly, secretary. Ronald Mattingly and Nevin Pratt are brothers, and Vicki Mattingly is the wife of Ronald Mattingly. The Intervenor Union's local officers are Chris Grundvig, president; Dana Jenkins, vice president; Warren Pratt, secretary. All of the local union officers are Co-op Mine employees, but the international officers are not. According to the testimony of Nevin Pratt, the local officers were nominated and elected by union members, and the international officers were elected by the local officers, pursuant to provisions of the constitution and bylaws. Ron Mattingly was the Intervenor Union's chief negotiator for the last contract with the Co-op Mine, and other officers also were involved in the negotiations.

According to record evidence, local union vice-president Dana Jenkins' parents are Alan Jenkins and Janiel F. Kingston. Alan Jenkins is a stipulated supervisor for the Co-op Mine and Janiel Kingston is the daughter of Charles Elden Kingston and Ethel M. Gustafson. Local president Chris Grundvig is the son of Alfred Grundvig, one of the founders of the Davis Co-op. International vice-president Nevin Pratt testified that he is a member of the Davis Co-op and that he has been assigned a membership number. He further testified that he and local union secretary Warren Pratt are cousins. It follows

that Nevin Pratt's brother, international president Ronald E. Mattingly, and Warren Pratt are also cousins.

II. DISCUSSION

A. Composition of Bargaining Unit

1. Community of Interest

Section 2(3) of the Act specifically excludes from the definition of "employee" "any individual employed by his parent or spouse." Since such individuals are not considered employees, they are also excluded from bargaining units. In the context of corporations, the Board has limited exclusion under Section 2(3) to the children or spouses of individuals who have at least a 50 percent ownership interest. *See Cerni Motor Sales, Inc.*, 201 NLRB 918 (1973). A child or spouse of a shareholder with less than a 50 percent ownership interest is considered a statutory "employee," and the Board determines whether that family member should be included in the bargaining unit pursuant to its authority under Section 9(b) of the Act. That determination by the Board focuses on whether the employee-relative shares a "community of interest" with non-relative employees.

In assessing the community of interest of employees related to shareholders, a variety of factors have been found relevant, including (1) how high a percentage of stock the shareholder owns, (2) how many of the shareholders are related to one another, (3) whether the shareholder is actively engaged in management or holds a supervisory position, (4) how many relatives are employed as compared with the total number of employees, (5) whether the relative lives in the same household or is partially dependent on the shareholder, (6) the activity, if any, of the employee in the Union, and

(7) the overall ties and social activities of the family involved. See *Caravelle Wood Products*, 200 NLRB 855 (1972), enf'd 504 F.2d 1181 (7th Cir. 1974); *Linn Gear Co. v. NLRB*, 600 F.2d 791 (9th Cir. 1979), vacating 236 NLRB 64 (1978). By focusing on these guidelines, the disparate interests of the two groups of employees in this case are evident.

(1) Percentage of stock the shareholder owns: As set forth previously, the Employer's 16 shareholders own from 0.5 percent to 14 percent of the corporation's stock. Record evidence establishes family ties for 11 of these shareholders identified above, and they collectively own 84.5 percent of the Employer's stock. The remaining stock may also be family-owned since all stock transactions must be approved either by the corporate directors or other shareholders. In *Hothouse Furniture Corp.*, 242 NLRB 414 (1979), the Board found the interests of relatives more closely allied with those of management than their fellow employees where they were related to persons who collectively owned at least 70 percent of the employer's outstanding stock.

(2) Number of the shareholders are related to one another: As explained above, record evidence establishes that at least 11 of the 16 shareholders are related to one another, by blood or marriage. There is no family information in the record for the remaining 5 shareholders, but they may be related to the other shareholders since stock ownership is controlled by the existing shareholders and directors. All 156 employees with family connections established by the record are related in some degree to each of the shareholders whose family connections can be established by the record. Although many of the employees are related to shareholders as grandchildren, nieces, or nephews, the evidence shows that shareholders have at least 44 children or siblings

who are employees. The Board has found distant relations sufficient to find collective ownership by the family. *See Hothouse Furniture, supra,* at 416 n. 9 (Individuals tracing ancestry to a common great-grandfather held 75 percent of corporate stock.)

(3) Whether the shareholder is actively engaged in management or holds a supervisory position: There is no evidence that any of the shareholders are actively engaged in day-to-day management or supervision of the Employer's operations. Shareholders Bill Stoddard and Dorothy Sanders serve as corporate directors and officers, along with the Co-op Mine manager, Charles Reynolds, who is not a shareholder. Nevertheless, the record establishes that Mr. Reynolds, and most other managers and supervisors involved in the daily operation of the mine, are family members and are related to shareholders and employees who are family members.

(4) Number of relatives employed as compared with the total number of employees: A total of 156, or approximately 71 percent, of the 220 total number of employees have family ties established by record evidence. Without including those with common family surnames, the number of relatives constitutes 56 percent. In either case, the percentage of all employees who are family members gives the family considerable potential to influence the other employees regarding bargaining unit issues. *See Marvin Witherow Trucking*, 229 NLRB 412 (1977) (Father of owner excluded where ratio of relatives to nonrelatives was high.)

(5) Whether the relative lives in the same household or is partially dependent on the shareholder. The record contains little evidence regarding living arrangements or possible financial dependence of employee-relatives on shareholders. As discussed below, under the particular circumstances present in this case, however, a broader

application of this factor may be appropriate. Thus, the relatives here are associated with a long-standing religious and economic family endeavor in which their participation from an early age may create influences and financial dependence comparable to that experienced by an employee living in the same household with, or financially dependent on, shareholder-relatives.

(6) The activity, if any, of the employee in the Union: The Intervenor/Incumbent Union entered into evidence a list of 111 individuals who have, at various times, submitted applications to join the Intervenor Union. Ninety-one of these individuals are current employees, and the record establishes family connections for all but 6 of these employees. In September 2003 approximately 75 non-family employees participated in a work stoppage and signed a petition authorizing the Petitioner to represent them for purposes of collective bargaining. No employee-relatives joined in these activities.

(7) The overall ties and social activities of the family involved: The record here shows that the employees of the extended family share common economic and religious ties and are associated with the Davis Co-op organization which conducts activities to help the family achieve its common goals through cooperative efforts. In particular, the evidence establishes that family members own, manage, and work at numerous businesses connected with the Davis Co-op, including the Co-op Mine. Family members also participate in religious services of the family-established Latter Day Church of Christ, and they attend bi-weekly Davis Co-op training meetings, as well as family social activities.

Based upon the foregoing community of interests analysis, I find that the Employer is principally owned, controlled, managed, and supervised by family

members, and the interests of employees who are family members are closely allied with those of the Employer.

2. Special Status Test

In cases where ownership is not an issue, the Board does not apply an "expanded community of interest" test to relatives of managers. The test normally applied where the employees at issue are related to managers without any ownership interest in the employer is "special status" on the job. *Cumberland Farms*, 272 NLRB 336 (1984). The Board confirmed this policy recently in *Peirce-Phelps, Inc.*, 341 NLRB No. 78 (April 12, 2004), observing that "[a]n employee-relative of a non-owner manager is excluded from a bargaining unit as a matter of Board policy only if that employee enjoys 'specific special privileges or benefits' by virtue of the relationship."

Proving special status here is not necessary since the Employer's owners, officers, directors, managers, and supervisors are members of the same family and related to one another as well as to the employee-relatives at issue. In such circumstances, the Board has found it more likely that the interests of the Employer will be synonymous with the interests of the family to which the employees belong. *Parisoff Drive-In Market, Inc.*, 201 NLRB 813 (1973). The Court in *Action Automotive*, 469 U.S. 490 (1984), observed that the Board has excluded employee-relatives from the unit on a case-by-case basis even though the employees enjoyed no special job-related benefits when other criteria indicate their interests are aligned with management.

Even though special job related status may not be essential, it is nevertheless an important factor in assessing whether employee-relatives share a sufficient community

of interest with other employees. As discussed below, the record evidence demonstrates that employee-relatives in this case do have special status on the job.

First, the special status of employee-relatives is apparent in their work scheduling. As noted above, almost all part-time employees are family members. The eight part-time employees not identified by the evidence as family members may be related to the family as well since the record contains no evidence to the contrary.

The evidence further shows that part-time employees work almost exclusively on weekend shifts and full-time employees work weekday shifts. Exceptions result primarily from the need to fill certain positions with individuals having specific qualifications. By contrast, there are only seven full-time employees scheduled on weekend shifts, all, except for one janitor, employed in equipment operator or helper positions, such as tipple operator, bolter operator, or miner operator.

The following direct testimony from Mr. Reynolds is also useful in understanding the Employer's use of family members to fill the weekend shifts:

> Q. Why do you hire part-timers?
> A. We -- at the mine, a barricaded mine, we do operate 24 hours a day seven days a week. So in an effort to minimize the amount of overtime the company runs into with employees, we do have odd schedule shifts. What we've found is the labor pools fill all those positions with full-time employees. We have not found a labor pool that's been necessary to fill those positions with part-time help.

(Transcript, p. 49) Although Mr. Reynolds' answer is not entirely clear, I find that the only interpretation consistent with other record evidence is that family members are used to fill the part-time weekend shifts because the Employer has been unable to obtain part-time workers from local employment agencies.

Second, the special status of part-time employee-relatives is evident in their rotating weekend schedule and in the degree of flexibility they are allowed in deciding when they will work. If part-time employees adhere to the Employer's projected schedule as explained above, those assigned to a 2-day weekend schedule should work an average of 16 hours during each bi-weekly payroll period, or 112 hours for the 7 pay-periods immediately preceding the hearing. Those assigned to a 3-day weekend schedule should work an average of 24 hours during each bi-weekly payroll period, or 168 hours for the 7 pay-periods. A review of the Employer's payroll records shows that only about 7 of the 70 part-time production employees worked the average number of hours required by their projected schedules. Nor do the records indicate any consistent adherence to a 3-week rotation.

Mr. Reynolds' testimony provides an explanation for the sporadic part-time work patterns. He stated that the organizational chart listing shift assignments of part-time production employees does not reflect either the past or future work schedule of the employees listed. Rather, his testimony emphasized that when and how much they worked was dependent upon the employee's availability from week to week. Mr. Reynolds further stated that employees change schedules fairly often "if they have personal need or something comes up." Although this testimony was directed specifically to the work schedules of the 70 part-time production employees, the payroll records establish that the remaining part-time employees are also not confined to a regular work schedule. Additionally, the ability of part-time employees to work at their convenience is consistent with Lu Ann Cooper's testimony that the Employer was compelled to seek weekend workers through announcements at church meetings.

Accordingly, I find that the part-time employee-relatives, unlike other employees, are routinely permitted to change their work schedules for their personal convenience, and therefore, enjoy a special status as a result of their relationships to owners and managers. *See Hothouse Furniture Corp.*, 242 NLRB 414 (1979); *Novi-American Inc.-Atlanta*, 234 NLRB 421 (1978). In *Peirce-Phelps, Inc.*, 341 NLRB No. 78, the Board found the fluctuating work schedule of the 16-year-old son of a non-owner manager distinguishable from *Novi American* because the employee-relative in *Peirce-Phelps* worked within the employer's regular shift schedule, and, unlike the employee-relative in *Novi American*, did not work a fluctuating schedule to suit his own convenience. I find that the part-time employee-relatives here, as in *Novi American*, alter their shift schedules to suit their own convenience.

Third, special status is evident in the wage difference between employee-relatives and non-relatives. Record evidence reveals that the average hourly wage rate received by the 156 employee-relatives is $6.02, or 22 percent less than the $7.33 average received by the 64 non-relative employees. If their supplemental wage rate[29] is included, the employee-relatives average $6.43 an hour, or 21 percent less than the $7.80 average received by non-relative employees. These substantial differences are not due to the fact that more than 70 percent of the employee-relatives work part-time, since part-time employee-relatives actually have a higher average wage rate than the full-time employee-relatives. Thus, part-time employee-relatives receive an average wage rate of $6.13 an hour, while full-time employee-relatives average $5.71. If

[29] Hourly wage supplements ranging from $0.45 to $0.75 an hour are contingent mainly on good attendance. Discretionary production bonuses ranging from $3 to $71 per week are also available, but there is no record evidence indicating any amounts actually received by employees.

supplemental wage rates are included, the average wage rate is $6.59 for part-time employee-relatives, and $6.09 for full-time employee-relatives.

The average wage rate for managers and supervisors, all of whom are family members, is $7.71 an hour, or $8.80 an hour if their supplemental rates are included. The mine manager receives a salary equivalent to $8.00 an hour, with $1.25 an hour wage supplement. The wage rates for other managers and supervisors range from $7.25 to $8.00 an hour, and 25 percent of the non-relatives are paid as much or more than the highest paid manager or supervisor, while only 1.2 percent of the relatives are paid that well.

The record contains little explanation for why employee-relatives are paid substantially less than non-relatives, other than certain information provided by Lu Ann Cooper. Ms. Cooper testified that Davis Co-op members, including those employed at the Co-op Mine, receive "service statements" and check stubs indicating how much they had earned, but they did not actually receive paychecks. She also described a debit or credit card system that members used exclusively with Davis Co-op businesses. Although this testimony is based upon personal knowledge of Ms. Cooper prior to when she left the Davis Co-op in 2000, it is either unchallenged or not satisfactorily rebutted on the record.

A fourth factor pointing to special status is the amount of overtime worked by the two groups of employees. The Employer's 2004 payroll records contain the hours worked during the first 14 biweekly payroll periods for 35 full-time employee-relatives and 30 full-time non-family employees. Although about 35 full-time non-family employees who engaged in the work stoppage are not included in the payroll records

because they had only recently returned to work, this does not affect the usefulness of the records for the purpose of comparing overtime worked by the two groups of employees. The records show that full-time employee-relatives worked approximately 15 hours of overtime per biweekly pay period, on average. The 30 full-time non-family employees averaged approximately 44 hours of overtime, or almost 3 times as many hours as the family members. Regardless of whether working substantially less overtime is considered a benefit or a detriment, it shows that employee-relatives have special status with the Employer because they are treated differently as a group.

3. *Seton Hill College*

In addition to the Board cases discussed above, I have also considered decisions dealing with unit exclusions based upon membership in religious organizations. As noted previously, the Petitioner relies primarily on *Seton Hill College*, 201 NLRB 1026 (1973), to support its argument that Davis Co-op members should be excluded from the unit. In that case, the Board excluded faculty who were members of the Order of the Sisters of Charity of Seton Hill from a bargaining unit of lay faculty members because of a conflict of loyalties and a lack of common economic interests. As a corporation, the order held legal title to the buildings and grounds of the college, and members of the order occupied 50 percent of the positions on the governing board of the college. Members of the order also took vows of poverty and obedience to the head of the order and relinquished their rights to temporal goods.

In *Seton Hill*, the Board reasoned that, as members of the bargaining unit, the sisters would be subject to a conflict of loyalties because, although employees, they were also in a sense part of the employer because they owed obedience to the order

which owned and administered the college. In addition, the Board found a lack of common economic interest because, unlike lay faculty, the sisters serving as faculty members were not paid directly by the college. Instead, their wages, less living expenses, were paid directly to the order and the order gave each sister a monthly allowance. The order also paid life and medical insurance premiums for the sisters and maintained a separate pension plan for them, further distinguishing their economic interests from that of the lay faculty.

I conclude that the Board's unit determination polices expressed in *Seton Hill College* are relevant in this case. In *Niagara University*, 227 NLRB 313, 313 (1976), the Board explained that its *Seton Hill* decision excluded religious faculty from a unit of lay faculty primarily on two grounds:

> First, it concluded that as the nuns were members of the order operating the college they were "in a sense a part of the employer" which, especially in light of their vow of obedience, would place them as members of the bargaining unit in a position of conflicting loyalties . . . . Second, it held that their vow of poverty resulted in a divergence of economic interests between the lay faculty and themselves and thus the two groups had "different interests."

The facts of this case have significant parallels with those of *Seton Hill College.* Employees who are associated with the Davis Co-op are "in a sense a part of the employer." This is true because certain Davis Co-op family members own at least 75 percent of the Employer's shares and occupy all officer, director, and manager positions of the Co-op Mine. Shareholders cannot sell their shares without approval of the directors, making it unlikely that family members would ever lose control of the corporation. The land and facilities used by the Employer are leased from C.O.P. Coal, which is controlled by family members.

Like the order members in *Seton Hill*, the employee members of the Davis Co-op would be placed in a position of conflicting loyalties as bargaining unit members. While the record evidence fails to reveal what, if any, vows or disciplines are undertaken by members of the Davis Co-op, it does reveal that loyalty to the Davis Co-op and its objectives is expected and valued. This is evident in Lu Ann Cooper's testimony that the Davis Co-op leader, Paul E. Kingston, assigns a number to certain members if they have demonstrated sufficient loyalty, and the person with the lowest number is next in line to be the leader.

One source of loyalty and obedience to the Davis Co-op is the shared religious beliefs and objectives of its members. As described earlier, Davis Co-op was founded to pursue religious goals through cooperative economic efforts. Its members attend the family-established church and are taught the values of the group at regular training meetings.

Another important source of loyalty and obedience to the group is the prolific familial ties of Davis Co-op members. As discussed above, the record evidence establishes multiple family relationships between and among the Employer's shareholders, officers, directors, managers, supervisors, and a majority of its employees. As members of the family, these individuals are also members of the Davis Co-op. Some of these relationships appear to be distant ones, at least in so far as can be determined from the limited family history evidence available in the record. Even so, what they may lack in closeness is overshadowed by their quantity. These familial relationships are certain to engender in employees a strong sense of loyalty to the family and its economic and religious aspirations. In other words, as the court noted in

N.L.R.B. v. Caravelle Wood Products, 504 F.2d 1181, 1187 (7th Cir. 1974), "blood is thicker than water."

The evidence here, similar again to that in *Seton Hill College*, demonstrates a divergence of economic interests between Co-op Mine employee-relatives and those employees who are non-relatives, such that the two groups have different interests. Confirmation of this divergence is found, in part, by comparing wage rates of the two groups. Employee-relatives as a group receive lower wage rates than non-relatives. This difference, on average, is approximately 33 percent for full-time employees, and 21 percent for all employees. The evidence available does not establish that this degree of wage disparity is attributable to the level of skill or experience of the employees. A group of employees paid substantially less than the other bargaining unit employees can properly be excluded from a unit even where other terms and conditions of employment are the same. *See Nazareth Regional High School v. NLRB*, 549 F.2d 873, 879 n. 3 (2nd Cir. 1976). Not only are employee-relatives here paid substantially less than the non-relatives, they are treated differently in terms of their scheduling and the amount of overtime that they work, as previously discussed.

Based upon this disparity of interests of employee-relatives discussed above, I find that they should be excluded from a bargaining unit of employees who are not family members.

4. Irregular Work Schedule

The parties agree that the formula to be applied for determining voting eligibility of part-time workers is that which is set forth by the Board in *Davis-Paxton Co.*, 185 NLRB 21, 24 (1970). Under that formula, any employee who regularly averages 4

hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest for inclusion in the bargaining unit. The Board normally applies Davis-Paxton to determine eligibility of part-time or on-call employees, absent a showing of special circumstances. *Steppenwolf Theatre Co.*, 342 NLRB No. 7 (2004). Petitioner argues that an expanded time frame of six months should be used to determine eligibility because many part-time employees work sporadic, irregular schedules. Although irregular patterns of employment in the entertainment industry have sometimes led the Board to create eligibility formulas suited to those unique conditions, I find that the record here does not establish circumstances warranting deviation from the standard Davis-Paxton formula. *See Steppenwolf Theatre Co.,* supra; *see also National Poster, Inc.*, 282 NLRB 997, 1003 n. 14 (1987). Accordingly, unless otherwise excluded by this decision, I find that any unit employee who has averaged 4 hours per week in the 13 weeks (a minimum of 52 hours) immediately preceding the date of this Decision and Direction of Election is eligible to vote.

B. <u>Jose Ortega Supervisory Status</u>

In support of its position that Jose Ortega is a statutory supervisory, Petitioner relies primarily on Petitioner's Exhibit 5. That document, as previously discussed, contains a notation from supervisor Randy Defa suggesting that "Jose O." had told employee Celso Panduro that he was fired. According to Petitioner, Mr. Defa's hand written notation, made in January 2001, establishes that Jose Ortega has authority to fire employees, even if Mr. Panduro was not actually fired in 1998. Petitioner also contends that Mr. Ortega's supervisory status is confirmed by the fact that his wage rate is double that of other employees. The Employer argues that Mr. Defa's notation only

indicates that “Jose O.” told Mr. Panduro that he was fired, not that he fired him, and that records show that he was not fired, but simply did not return from a leave of absence.

Although the notation may show that Mr. Defa thought that “Jose O.” had authority to fire employees, it provides an insufficient basis to conclude that he is a statutory supervisor. The notation was written in 2001 and establishes only that Mr. Defa thought that “Jose O.” had authority to fire employees in 1998. The record establishes that in 1998 the Employer employed both Jose Ortega, Sr. and Jose Ortega, Jr. At the time of hearing, only Jose Ortega, Sr. was employed. Even assuming the 2001 notation referenced Jose Ortega, Sr., it does not prove that he continues to have such authority. Importantly, there is no evidence to indicate that Mr. Ortega’s alleged firing authority can be exercised without management approval based on an independent investigation. Thus, the record evidence is insufficient to establish that Jose Ortega, Sr. is a supervisor within the meaning of Section 2(11) of the Act. As the party urging that Mr. Ortega possesses and exercises statutory supervisory authority, the Petitioner has the burden of demonstrating that status. *NLRB v. Kentucky River Community Care*, 1212 S. Ct. 1861, 1866-1867 (2001); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999). Accordingly, I shall include Jose Ortega, Sr. in the bargaining unit.

C. <u>Labor Organization Status</u>

The record evidence is sufficient to establish that the Intervenor is a labor organization under Section 2(5) of the Act. Thus, employees participate in the Intervenor by nominating, electing, and serving as local officers, and the Intervenor has

dealt with the Employer by negotiating collective-bargaining agreements covering terms and conditions of employment.

Regarding the Petitioner's argument that the Intervenor cannot be a labor organization under the Act because its officers and membership have family ties to the Employer's owners and managers, I find insufficient evidence to reach that conclusion. In arguably analogous cases, employee-shareholders have been disqualified from representing employees, but only if their ownership interest and accompanying managerial control over the employer would necessarily interfere with the employees' right to be represented with undivided loyalty.[30] Even though the Intervenor Union's officers may be family members, there is no evidence that they have a financial stake in and exert managerial control over the Employer equivalent to the employee-shareholders' ownership and control in *Lake Pilots Assn.* Thus, there is insufficient evidence supporting the theory that the Intervenor Union officers' family relationship creates a disabling conflict of interest. Accordingly, I conclude that the Intervenor Union is a labor organization within the meaning of Section 2(5) of the Act.

III. CONCLUSION

Consistent with the above, I find that the employees of C. W. Mining Company, d/b/a/ Co-op Mine, who are related by blood or marriage to past or present members of

[30] *See, e.g., Lakes Pilots Assn.*, 320 NLRB 168, 168-69, 178-79 (1995) (8(a)(2) violation where employer's union-represented employee-shareholders had voting rights in the employing entity and actively participated in union affairs, thereby creating a disabling union conflict of interest). *Cf. Science Applications Corp.*, 309 NLRB 373, 374-75 (1992) (rejecting employer's contention that petitioned-for unit was inappropriate because it included employee-stockholders; mere employee stock ownership will not preclude unit placement unless the ownership interest gives "an effective voice in the formulation and determination of corporate policy" or results in preferential treatment sufficient to destroy stockholders' community of interest with nonstockholders); *Centerville Clinics, Inc.*, 181 NLRB 135, 139-40 (1970) (where union represented employees of a health clinic funded primarily by union welfare and retirement fund money and whose directors were almost all union representatives, union effectively sat on both sides of the bargaining table, creating a disabling conflict of interest); *Brookings Plywood Corp.*, 98 NLRB 794, 798-99 (1952) (employee-shareholders excluded from bargaining unit of nonstockholders where they effectively influenced corporate policy).

the Davis County Cooperative Society, Inc., are excluded from the appropriate unit for purposes of collective bargaining. There are approximately 64 eligible employees in the unit found to be appropriate. I further find that the International Association of United Workers Union is a labor organization within the meaning of Section 2(5) of the Act, and that Jose Ortega is not a supervisor under Section 2(11) of the Act and should be included in the bargaining unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.[31] Eligible to vote are those in the unit who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Those eligible to vote also include those who regularly average four hours per week for the last quarter prior to the eligibility date. Employees engaged in any economic strike, who have maintained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear

[31] Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by:

INTERNATIONAL ASSOCIATION OF UNITED WORKERS UNION

OR

UNITED MINE WORKERS OF AMERICA

OR

NEITHER

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700

North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433, on or before **November 26, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **December 2, 2004**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado, this 18th day of November, 2004

/s/ B. Allan Benson_____
B. Allan Benson, Regional Director
National Labor Relations Board
Region 27
700 North Tower, Dominion Plaza
600 Seventeenth Street
Denver, Colorado 80202-5433